United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 16, 2001

TO : Curtis A. Wells, Regional Director

Region 15

Philip E. Bloedorn, Acting Regional Director

Region 30

Sandra Dunbar, Regional Director

Region 3

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Cellu Tissue Corp. d/b/a Coaster Paper Company

Cases 15-CA-15975; 30-CA-15285; 3-CA-22712

512-5012-0133-2275

512-5012-0133-5000

Case 15-CA-15975 was submitted for advice as to whether the Employer's rules regarding employee standards of conduct violate Section 8(a)(1) of the Act.

The Employer operates paper manufacturing plants in East Hartford CT, Gouverneur NY, Menominee MI, and Wiggins MS. The Paper, Allied-Industrial, and Energy Workers International Union (the Union) represents employees at the Gouverneur and Menominee facilities. The employees at the Wiggins facility are unrepresented. The Union has been in negotiations with the Employer for a contract at its Gouverneur and Menominee facilities since they were purchased in 1998. During the course of negotiations, the Employer informed the Union that it maintains the rules that are the subject of these cases at all of its facilities, including the Wiggins facility.

The Employer distributed its Rules document by computer, to which all employees have access. Rule 38 prohibits "Making false, vicious or malicious statements concerning the Company, its employees, and/or its products." Rule 63 prohibits "Any action which tends to destroy good relations between the Company and its employees or between the Company and its suppliers or customers." The Rules document states that violation of the rules may result in discharge. In the Wiggins case, the Employer asserts that there has been no discipline of employees pursuant to these rules.

The Employer's standards of conduct rules appear to be substantially the same at each of its facilities. In November, 2000, Region 30 issued complaint in case 30-CA-15285 alleging that the Employer unlawfully maintained and enforced Rule 63 at its Menominee facility. Region 30 has informed Advice that the Union's initial charge did not allege Rule 38 as unlawful. However, the Union recently filed a new charge with Region 30 that attacks that rule. The Union has also filed a charge with Region 3 (3-CA-22712) attacking these rules. In both the Region 30 and the Region 3 case, there are other violations alleged in addition to maintenance of unlawful rules. In the Region 15 case, there are no other allegations of unlawful conduct.

We conclude that Rules 38 and 63 are facially overbroad and unlawful because they could reasonably be interpreted by employees to preclude activities protected by Section 7.

Rule 38 is almost identical to a rule that the Board in <u>Lafayette Park Hotel</u> found unlawful. Relying on established precedent, the Board found in that case that a rule prohibiting "making false, vicious, profane or malicious statements toward or concerning Lafayette Park Hotel or any of its employees" prohibited and punished merely "false" statements, in addition to maliciously false statements. The rule therefore failed to accurately define the area of permissible conduct and reasonably would cause employees to refrain from engaging in protected activities.

Rule 63 is similar to a rule the Board found Lafayette Park Hotel, but with an important distinction. The Lafayette Park rule prohibited "unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or goodwill in the community." The Board held that employees reasonably would believe that such a rule, which was directed at "unlawful or improper conduct," was intended to reach serious misconduct, not conduct protected by the Act. The Board found that, in the absence of any enforcement of the rule against Section 7 activity, the language of the rule itself would not lead a reasonable employee to fear reprisal for lawful Section 7 activity.

¹ 326 NLRB No. 69 (1998).

Unlike the <u>Lafayette Park</u> rule, Rule 63 is not directed at "unlawful or improper conduct" but at "any action" which "tends to destroy good relations between the Company and its employees or between the Company and its suppliers or customers." Even in the absence of any prior enforcement against Section 7 activity, a reasonable employee could interpret this language to prohibit protected activities such as strikes, boycotts, speaking out publicly about the Employer's labor relations, and even employee discussions among themselves regarding terms and conditions of employment. Thus, this rule is ambiguous and could reasonably be interpreted to prohibit Section 7 activity, and therefore is unlawfully overbroad.²

Accordingly, Region 30 should amend its complaint to allege both of these rules as unlawful, absent settlement, and should seek a corporatewide expungement of these rules. [FOIA Exemption 5

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B.J.K.

Although the analysis set out in <u>Lafayette Park</u> is, in some ways, a departure from prior Board law, it leaves intact the well-established principle that maintenance of an ambiguous rule violates the Act if the rule reasonably would chill employees in the exercise of activity protected by the Act. See <u>J.C. Penney</u>, 266 NLRB 1223, 1224-5 (1983). The Board also reaffirmed the principle that if a rule is ambiguous, the ambiguity must be construed against the employer as the promulgator of the rule. See <u>Lafayette Park Hotel</u>, 326 NLRB No. 69, slip op. at 5, citing Norris/O'Bannon, 307 NLRB 1236, 1245 (1992).